

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 MELVIN WARREN RIVERS,  
12 Movant,  
13 v.  
14 UNITED STATES OF AMERICA,  
15 Respondent.

Case No.: 3:16-cv-1604-BEN  
3:13-cr-3954-BEN-1

**ORDER DENYING MOTIONS**  
**[Docs. 69, 81, 82, 87, 88, 93, 99, 100,**  
**101, 103, 104, 106, 107, 108, 109, 110,**  
**111]**

16  
17 Movant Melvin Warren Rivers moves under 28 U.S.C. § 2255 to Vacate, Set Aside,  
18 or Correct his Sentence and claims actual innocence. He also has filed a number of  
19 ancillary motions. Having reviewed the briefing and Movant's other related filings, the  
20 Court finds an evidentiary hearing is not warranted, and the motions are DENIED.

21 **BACKGROUND**

22 In August and September 2013, law enforcement located several online prostitution  
23 ads advertising a 17-year-old minor for commercial sex. The minor-victim's cellphone  
24 contained communications between she and Movant, including a credit card number used  
25 to post several of the online advertisements. The minor-victim stated she had known  
26 Movant since she was 14 years old. In August 2013, law enforcement arrested Movant for  
27 sex trafficking of the minor-victim.  
28

1 On October 30, 2013, a federal grand jury returned an indictment charging Movant  
2 with sex trafficking of children in violation of 18 U.S.C. § 1591. Before trial, the parties  
3 agreed to resolve the case.

4 On July 17, 2014, a superseding information alleging conspiracy to commit sex  
5 trafficking of children in violation of 18 U.S.C. § 1594 was filed. That same day, Movant  
6 pled guilty to the superseding information through a plea agreement with the Government.

7 On April 20, 2015, this Court sentenced Movant to 97 months of custody to be  
8 followed by 10 years of supervised release. The Court confirmed the sentence and imposed  
9 the proposed conditions of supervised release on May 26, 2015. On June 18, 2015, the  
10 Court entered the judgment.

11 On June 17, 2016, Movant filed a § 2255 motion, alleging ineffective assistance of  
12 counsel. [Doc. 69.] On September 20, 2016, the Court granted the Government's motion  
13 to waive the attorney-client privilege for the purpose of responding to several allegations.  
14 [Doc. 72.] The Government responded to the § 2255 motion and included a declaration by  
15 Movant's Counsel, Gerald McFadden. [Docs. 77, 77-1.]

16 On September 15, 2017, Movant filed a motion to "suppliment [sic] and amend  
17 petitioners initial 28 U.S.C. § 2255." [Doc. 82.] On September 10, 2018, Movant filed a  
18 motion for a claim of actual innocence due to newly discovered evidence. [Doc. 88.] On  
19 October 31, 2018, the Government responded to both filings. [Doc. 91.]

20 Over the course of litigation, Movant also filed numerous additional motions,  
21 including motions for appointment of counsel [Docs. 103, 111], motions to expand the  
22 record and to request discovery [Docs. 81, 106], motions for an evidentiary hearing [Docs.  
23 93, 104], a motion to take judicial notice [Doc. 87], a Rule 12(c) motion [Doc. 108], and a  
24 motion for default judgment [Doc. 110]. For the reasons set forth below, Movant's motions  
25 are DENIED.

## DISCUSSION<sup>1</sup>

### A. Motion for Appointment of Attorney [Docs. 103, 111]

Courts have discretion to appoint counsel for indigent civil litigants upon a showing of exceptional circumstances. *See Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301, 1318 (9th Cir. 1981). “A finding of exceptional circumstances requires an evaluation of both the likelihood of success on the merits and the ability of the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved.” *Terrell*, 935 F.2d at 1017 (9th Cir. 1991) (internal citations omitted); *see also Bradshaw*, 662 F.2d at 1318. “Neither of these factors is dispositive and both must be viewed together before reaching a decision.” *Terrell*, 935 F.2d at 1017 (internal citations omitted).

As explained in further detail below, the Court finds Movant’s motions to be without merit, and thus, the Court cannot say there is any likelihood of success on the merits. Moreover, Movant fails to demonstrate an inability to represent himself beyond the ordinary burdens encountered by litigants representing themselves pro se. Therefore, the Court finds the exceptional circumstances required for the appointment of counsel are not present. Movant’s motions for appointment of counsel, [Docs. 103 and 111], are DENIED.

### B. Movant’s June 17, 2016 § 2255 Motion [Doc. 69]

In support of his § 2255 motion timely filed on June 17, 2016, Movant alleges two separate claims of ineffective assistance of counsel. First, he claims his attorney failed to challenge the facts in the complaint, which he contends were misrepresented by police to obtain an arrest warrant for him. Second, he contends ineffective assistance of counsel

---

<sup>1</sup> Having reviewed the record and briefing related to Movant’s § 2255 motions, the Court finds an evidentiary hearing is not warranted. [Docs. 93, 104.] Movant’s requests for an evidentiary hearing are DENIED. *See United States v. Quan*, 789 F.2d 711, 715 (9th Cir. 1986) (holding that, if it is clear the movant fails to state a claim or has “no more than conclusory allegations, unsupported by facts and refuted by the record,” a district court may deny a § 2255 motion without an evidentiary hearing).

1 because of his attorney's alleged failure to subpoena "exculpatory" text and Facebook  
2 messages between Movant and the minor.

3 Under Section 2255, a movant is entitled to relief if the sentence (1) was imposed in  
4 violation of the Constitution or the laws of the United States; (2) was given by a court  
5 without jurisdiction to do so; (3) was in excess of the maximum sentence authorized by  
6 law; or (4) is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v.*  
7 *Quan*, 789 F.2d 711, 715 (9th Cir. 1986). Here, Movant alleges his sentence was imposed  
8 in violation of his Sixth Amendment right to effective assistance of counsel. *Strickland v.*  
9 *Washington*, 466 U.S. 668, 688 (1984); *United States v. Alferahin*, 433 F.3d 1148, 1160-  
10 61 (9th Cir. 2006). Under the United States Supreme Court's decision in *Strickland*, a  
11 defendant who complains his attorney provided ineffective assistance must demonstrate  
12 both that (1) the attorney's performance "fell below an objective standard of  
13 reasonableness," and (2) there exists "a reasonable probability that, but for counsel's  
14 unprofessional errors, the result of the proceeding would have been different." *Strickland*,  
15 466 U.S. at 687-88. Movant fails to satisfy those elements.

16 1. Movant's Claim About the Complaint's Misstatement of Facts is Moot

17 Movant first claims his attorney was ineffective because he did not challenge alleged  
18 misstatements of fact in the complaint and arrest warrant. Even assuming the existence of  
19 a defect, however, such a challenge would have been mooted by a finding of probable cause  
20 following the grand jury's indictment.<sup>2</sup> See, e.g., *United States v. Holiday*, 2010 WL  
21 3733890, at \*4 (S.D. Cal. Sept. 17, 2010) ("[T]he grand jury indictment of Holiday  
22 remedied any defect in the complaint.") (citing *Denton v. United States*, 465 F.2d 1394,  
23 1395 (5th Cir. 1972) (rejecting argument by defendant that his sentence should be vacated  
24

---

25  
26 <sup>2</sup> Furthermore, as the Government correctly notes, Movant makes his ineffective  
27 assistance claim by incorrectly identifying Gerald T. McFadden, who was appointed only  
28 after the indictment's filing. [Doc. 16, Ex. 1 at ¶¶ 1-2.] He should have identified Howard  
B. Frank as his first attorney. Nonetheless, regardless of which attorney Movant argues to  
be ineffective, his claim lacks merit.

1 due to a defective complaint and arrest warrant because “the grand jury indictment of  
2 Denton following his arrest remedied any defect in the complaint and arrest warrant”)); *see*  
3 *also Cusamano v. Donelli*, 2010 WL 2653653, at \*3, 8 (S.D.N.Y. July 1, 2010) (“The  
4 indictment by the grand jury rendered any deficiency in the criminal complaint moot”)  
5 (“Assuming, arguendo, that the felony complaint was defective, Movant was prosecuted  
6 pursuant to a legally sound grand jury indictment.”). Here, because the grand jury’s  
7 indictment of Movant on the sex trafficking charge remedied any alleged defect in the  
8 complaint and arrest warrant, Movant’s attorney cannot be ineffective for “[f]ail[ing] to  
9 raise a meritless argument.” *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985).

10 2. Any Messages Regarding Knowledge of the Minor’s Age Would Not Negate

11 Movant’s Mens Rea

12 Next, Movant contends his attorney was ineffective because of his alleged failure to  
13 obtain text and Facebook messages showing the minor lied about her age, thereby causing  
14 him prejudice. Movant’s claim fails.

15 Movant was charged under § 1591, which permits three potential ways of proving  
16 criminal liability as to Movant’s awareness of the child’s status as a minor: (1) he knew  
17 she was under eighteen; (2) he recklessly disregarded the fact that she was under eighteen;  
18 **or** (3) he had a reasonable opportunity to observe her. *See United States v. Robinson*, 702  
19 F.3d 22, 29 (2d Cir. 2012) (affirming district court’s jury instruction on the three alternative  
20 *mens rea* requirements of § 1591). Even assuming the existence of text and Facebook  
21 messages showing the minor lied about her age to Movant, such messages would not have  
22 exculpated Movant because of his reasonable opportunity to observe her. As the Second  
23 Circuit held:

24 Because § 1591(a) requires proof of knowledge or reckless disregard—not  
25 both—the government may satisfy its burden by proving knowledge *or the*  
26 *substitute for knowledge under § 1591(c)*. Accordingly, § 1591(c) supplies  
27 an *alternative* to proving any *mens rea* with regard to the defendant’s  
28 awareness of the victim’s age.

1 *Id.* at 32 (emphasis in original); *see also United States v. Rico*, 619 Fed. App'x. 595 (9th  
2 Cir. 2015) (“find[ing] the Second Circuit’s explication of the provisions persuasive”  
3 without deciding the issue and “not[ing], however, that Congress has now amended the  
4 statute to comport with the Second Circuit’s approach”) (citing 18 U.S.C. § 1591(c)  
5 (2015)).

6 Although “reasonable opportunity to observe” is not defined, courts have held that  
7 as little as twenty minutes up to two days is enough to show a reasonable opportunity. *See*,  
8 *e.g.*, *United States v. Davis*, 711 Fed. App'x. 254, 258 (6th Cir. 2017); *United States v.*  
9 *Blake*, 868 F.3d 960, 976 (11th Cir. 2017). Here, Movant admitted he understood the  
10 factual basis for his plea, including admitting that “[he] had a reasonable opportunity to  
11 observe the minor” for a 5-day period between August 15 and August 20, 2013, during  
12 which he “rented hotel rooms, provided credit card information and caused ads to be posted  
13 on backpage.com for the minor for the purpose of her to engage in commercial sex acts.”  
14 [Doc. 41 at p. 14 (Plea Agreement).] The evidence additionally showed that Movant had  
15 known the minor since she was 14 years old. [Doc. 48 at p. 4 (PSR).] Finally, as argued  
16 by Movant, he had communicated with the minor by text messages and Facebook  
17 messages. Thus, even if Movant could have argued a lack of “knowledge” supported by  
18 the Facebook and text messages, the evidence showing he had a reasonable opportunity to  
19 observe the minor would have easily satisfied § 1591(c)’s *mens rea* requirement.  
20 Accordingly, Movant’s attorney’s alleged failure to obtain the messages did not create “a  
21 reasonable probability that, but for counsel’s unprofessional errors, the result of the  
22 proceeding would have been different.” *Strickland*, 466 U.S. at 687-88.

23 Furthermore, as to the text messages, Movant cannot satisfy the second *Strickland*  
24 prong—that his attorney’s failure to obtain them “fell below an objective standard of  
25 reasonableness.” Indeed, Movant’s former counsel explained that he could not retrieve the  
26  
27  
28

1 text messages because the provider, Verizon, does not maintain text messages on its server,  
2 and Movant sold his cellphone on Craigslist prior to his arrest.<sup>3</sup> [Doc. 77-1 at ¶ 4.]

3 **C. Movant’s 9/15/2017 and 9/10/2018 § 2255 Motions [Docs. 82, 88]**

4 After the one-year statute of limitations ran from the Court’s June 18, 2015  
5 judgment, Movant filed two additional § 2255 motions more than two and three years later,  
6 on September 15, 2017 and September 10, 2018. [Docs. 82, 88.] *See* 28 U.S.C. §  
7 2255(f)(1)(A) (“A 1-year period of limitation shall apply to a motion under this section . .  
8 . [and] shall run from the latest of—the date on which the judgment of conviction becomes  
9 final”). Movant does not assert any basis for finding his subsequent motions timely. *See*  
10 *id.* at § 2255(f)(1)(B)-(D). Specifically, Movant does not allege any impediment to filing  
11 his motions, any right that has been recently recognized by the Supreme Court as  
12 retroactive, or that the facts supporting his claim were not available to him at the time of  
13 sentencing through the exercise of due diligence. Nor has Movant “obtain[ed] an order  
14 from the appropriate court of appeals authorizing the district court to consider the [second  
15 or successive] petition[s] as required by 28 U.S.C. § 2244(b)(3) and (4).” Rule 9 of the  
16 Rules Governing § 2255 Proceedings.

17 Moreover, Movant’s subsequent motions cannot be deemed amendments to his  
18 timely § 2255 motion because they do not “relate back.” Under Federal Rule of Civil  
19 Procedure 15(c), an amendment may be deemed timely because of its “relation back” to  
20 the original § 2255 motion, only if it clarifies a claim in that motion—that is, when the  
21 original motion and amendment involve a “common core of operative facts.” *Mayle v.*  
22 *Felix*, 545 U.S. 644, 664 (2004) (applying Rule 15(c) to § 2254 petition); *see also* Rule 12  
23 of the Rules Governing § 2255 Proceedings (permitting application of Federal Rules of  
24 Civil Procedure to § 2255 proceedings). Within the context of habeas cases, the Supreme  
25

---

26  
27 <sup>3</sup> Movant’s attorney did have access to the Facebook messages, but as already  
28 discussed, those messages would not have prejudiced the Government’s ability to prove  
their case because of the alternative “reasonable opportunity to observe” prong.

1 Court has held that, although the movant's amendments may arise from the same  
2 conviction and sentence, the amendments will not relate back to a timely-filed motion  
3 where the amendments "assert[] a new ground for relief supported by facts that differ in  
4 both time and type from those the original pleading set forth." *Id.* at 649-50.

5 Such is the case here. In his subsequent filings, Movant sets forth two additional  
6 claims "supported by facts that differ in both time and type from those [his] original  
7 pleading set forth." *Id.* First, he claims the sentencing calculations in his plea agreement  
8 are incorrect, and counsel was ineffective for failing to investigate the correct guidelines.  
9 [Doc. 82.] Second, he asserts an "actual innocence" claim based upon "newly discovered  
10 evidence" in the form of the minor-victim's testimony supporting his defense. [Doc. 88.]  
11 Because Movant's subsequent motions assert entirely new claims for relief, they do not  
12 "relate back" to his original motion and thus, are barred by the one-year statute of  
13 limitations.<sup>4</sup>

14 Within the Ninth Circuit, however, the relation back doctrine for habeas claims  
15 remains murky. *See, e.g., Ross v. Williams*, 896 F.3d 958 (9th Cir. 2018) (finding habeas  
16 movant's amended § 2254 petition did *not* relate back to original pleading), rehearing *en*  
17 *banc* granted, by *Ross v. Williams*, 2019 WL 1615300 (9th Cir. Apr. 16, 2019).  
18 Accordingly, in the alternative, the Court addresses Movant's subsequent claims, which  
19 the Court finds to be without merit.

20 1. The Sentencing Guidelines Applied to Movant Are Correct

21 Movant argues his attorney was ineffective for failing to "investigate" the "proper"  
22 guidelines for his offense, relying upon *United States v. Wei Lin*, 841 F.3d 823 (9th Cir.  
23  
24  
25

---

26 <sup>4</sup> On June 8, 2018, Movant filed a "motion for leave of court to file pro se motion to  
27 amend p[u]rsuant to 15(c) to amend 28 U.S.C. 2255 with all amended pleadings . . ." [Doc.  
28 109.] He did not offer any support for his motion. Nonetheless, the Court has considered  
his additional filings in this Order. Accordingly, his motion is DENIED as moot.



1 2016).<sup>5</sup> There are several reasons why this claim does not merit § 2255 relief. In *Wei Lin*,  
2 the Ninth Circuit discussed the Sentencing Guidelines for a conviction under § 1594(c),  
3 and concluded for the first time that the appropriate base offense level for a conspiracy  
4 conviction under § 1594(c) is not 34 under § 2G1.1, but instead, is 14 under the “otherwise”  
5 category in § 2G1.1. The reasoning is complicated and somewhat novel. Of course,  
6 Movant’s sentencing hearing occurred in 2015, 18 months *before* the Ninth Circuit’s  
7 decision in *Wei Lin*. That his attorney did not predict this decision can hardly be called  
8 ineffective assistance.

9 More importantly, although *Wei Lin* involved sex trafficking, Movant’s case is  
10 distinguishable because it involved sex trafficking of a *minor*. Consequently, *Wei Lin*  
11 interpreted a § 1594(c) conviction for conspiring to engage in sex trafficking under  
12 § 1591(a). For that crime, Sentencing Guideline § 2G1.1 applied. Unlike *Wei Lin*,  
13 however, Movant pleaded guilty to § 1594(c) for conspiracy to engage in the sex trafficking  
14 of a minor – a crime for which a minimum mandatory term of 10 years would apply under  
15 § 1591(a) and (b)(2). For that crime, Sentencing Guideline § 2G1.3 applies and supplies a  
16 base offense level of 30. Simply put, *Wei Lin* did not decide a case of conspiracy to engage  
17 in the sex trafficking of a minor and does not show that this Court miscalculated Movant’s  
18 Sentencing Guidelines. Thus, Movant fails to carry his burden of showing the first  
19 *Strickland* prong—that his attorney’s performance regarding his sentencing fell below an  
20 objective standard of reasonableness.

21 In addition, Movant expressly agreed that his base offense level was 30 in his plea  
22 agreement. At the time of the plea deal, Movant had been indicted and was facing trial for  
23 violating § 1591(a) and (b)(2), carrying the minimum mandatory 10 prison term. His  
24 counsel adroitly worked out a plea bargain resulting in a plea to a superceding indictment  
25

---

26  
27 <sup>5</sup> Movant reiterates the same arguments about *Wei Lin* in his “Motion: To Take  
28 Judicial Notice and Motion to Reduce Sentence,” [Doc. 99]. The motion is DENIED for  
the same reasons as discussed herein.

1 on the simple conspiracy charge of § 1594(c). The plea bargain had the effect of permitting  
2 Movant to escape a 10 year minimum mandatory sentence. As it turned out, he received a  
3 lesser sentence of 97 months. In other words, Movant fails to demonstrate prejudice under  
4 the second *Strickland* prong. Because Movant received a sentence of 97 months, which is  
5 23 months less than the ten-year mandatory minimum sentence he would have faced for a  
6 guilty verdict at trial, he suffered no prejudice. *See also Jackson v. United States*, 2017  
7 WL 1408174 (W.D. Wa. 2017), denying certificate of appealability, by *United States v.*  
8 *Jackson*, 2017 WL 5197492 (9th Cir. 2017) (finding no ineffective assistance of counsel  
9 where movant was sentenced prior to *Wei Lin* and where movant would have been subject  
10 to a 15-year mandatory minimum sentence but for his counsel’s plea deal negotiation).

11 None of this makes a difference, however, because *Beckles v. United States*, 137  
12 S.Ct. 886 (2017) forecloses Movant’s argument. There, the Supreme Court held that “the  
13 advisory Guidelines do *not* fix the permissible range of sentences. To the contrary, they  
14 merely guide the exercise of a court’s discretion in choosing an appropriate sentencing  
15 within the statutory range.” *Id.* at 892 (emphasis added). Consequently, for § 2255  
16 proceedings, even if one can show a Guidelines calculation error, *Beckles* explains that the  
17 calculation error does not warrant relief. It is only the sentence, itself, with which § 2255  
18 is concerned, not the correctness of the calculation of the Sentencing Guidelines as a  
19 starting point for sentencing. Therefore, this claim for § 2255 relief is unpersuasive.

## 20 2. Constructive Amendment is Not Cognizable For Attack On A Guilty Plea

21 Movant also filed what the Court construes as a supplemental reply brief or traverse.  
22 *See* [Doc. 100 (“Supplement and Amend Attachment to Petitioners initial reply to  
23 Government response filed on 10/19/16”)]. The Court construes his filing to argue a  
24 constructive amendment occurred because he pled guilty under the reckless or knowledge  
25 of *mens rea* theories for § 1594(c), rather than the reasonable opportunity to observe theory.  
26 In support, Movant cites *United States v. Davis*, 854 F.3d 601, 604 (9th Cir. 2017). In  
27 *Davis*, the Ninth Circuit concluded “a constructive amendment occurred because ‘the crime  
28 charged [in the indictment] was *substantially altered at trial*, so that it was impossible to

1 know whether the grand jury would have indicted for the crime actually proved.” *Id.* at  
2 605 (citing *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002) (emphasis added)).  
3 The case against Movant, however, could not be “substantially altered at trial” because  
4 there was no trial. Rather, Movant pled guilty. Thus, the Court is not persuaded that a  
5 constructive amendment claim is available to Movant here.

6 Notably, the Ninth Circuit has not addressed whether a constructive amendment  
7 argument is cognizable for a defendant’s attack on his guilty plea. Of the courts that have  
8 addressed that issue, however, most seem to have found such an argument unavailable  
9 within that context. *See, e.g., United States v. Barrientos*, 263 F.3d 162, n. 3 (5th Cir.  
10 2001) (noting that “constructive amendment inquiries typically are conducted in the  
11 context of jury trials and guilty verdicts, not guilty pleas,” and thus, declining to ground its  
12 mandate on the defendant’s constructive amendment argument); *Montstream v.*  
13 *Superintended, Bedford Hills Correctional Facility*, 2011 WL 284461, at \*6 (W.D.N.Y.  
14 Jan. 4, 2011) (“There is no clearly established Supreme Court precedent stating that a  
15 constructive amendment claim is cognizable in the context of a defendant’s guilty plea,”  
16 and “it seems unlikely that a constructive amendment claim is available to petitioner after  
17 his guilty plea”); *cf. United States v. Iacaboni*, 363 F.3d 1, 7 (1st Cir. 2004) (evaluating a  
18 constructive amendment claim in the context of a guilty plea). This Court agrees.  
19 Accordingly, because Movant attacks a guilty plea, rather than a jury verdict at trial, his  
20 constructive amendment argument fails.

21 3. Movant’s Allegedly “Newly Discovered Evidence” is Not Newly Discovered and  
22 Does Not Exculpate Him

23 Liberally construing Movant’s pro se claim that he is “actually innocent,” *Thomas*  
24 *v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010), Movant seems to contend that he is  
25 factually innocent of the conspiracy to sex traffic children crime for which he entered a  
26 guilty plea. [Doc. 88.] Movant’s allegedly “newly discovered evidence,” however, has  
27 little bearing on his guilt because it all concerns the minor-victim’s declaration that Movant  
28

1 is “innocent.”<sup>6</sup> Specifically, Movant offers the victim’s signed declaration stating that  
2 Movant “didn’t [sic] know my true age at the time”; that Movant was her boyfriend, and  
3 her mother did not agree with the relationship and called the police; and that Movant “is  
4 innocent of sex trafficking.” [Doc. 88 at p. 6.]

5 First, the minor-victim’s assertion that she told a detective she did not actually  
6 engage in commercial sex acts has no bearing on Movant’s guilt. “Case law makes clear  
7 that ‘commission of a sex act or sexual contact’ is not an element of a conviction under 18  
8 U.S.C. § 1591,” and the Ninth Circuit has “clarified that a conviction for sex trafficking of  
9 minors under 18 U.S.C. § 1591 does not require that victim actually commit a sex act.”  
10 *United States v. Hornbuckle*, 784 F.3d 549, 554 (9th Cir. 2015). As the Government  
11 argues, the online prostitution advertisements offering the minor for commercial sex acts  
12 combined with her initial statement to police where she stated she posted online  
13 advertisements for commercial sex acts supports Movant’s conviction.<sup>7</sup> [Doc. 48 (PSR) at  
14 ¶¶ 7, 11.]

15 Second, and as previously discussed, Movant’s actual knowledge of the minor-  
16 victim’s age is not relevant to his guilt because of the reasonable opportunity to observe  
17 prong. *See supra*, *United States v. Rico*, 619 Fed. App’x. 595 (9th Cir. 2015). Finally,  
18 Movant’s claimed innocence is belied by the strong evidence showing his awareness of  
19  
20  
21

---

22 <sup>6</sup> Moreover, Movant’s evidence is not “newly discovered,” as he admits in his filing  
23 entitled, “Declaration of Melvin Warren Rivers.” [Doc. 88 at p. 5, n.1 (“*During my first*  
24 *meeting with my attorney*, I informed him that I was innocent . . . [and, as proof,] I informed  
25 him that he could contact my witness [the victim-minor].”) (emphasis added)].

26 <sup>7</sup> For the same reasons discussed in this section, Movant’s motions to expand the  
27 record and to request discovery are DENIED. [Docs. 81, 106.] Movant seeks to expand  
28 the record with “[t]ranscripts, audio or video recording of the allege [sic] victims  
interview” and “[t]o request discovery” regarding the same. [Doc. 81 at p. 1.] As already  
discussed, even if true, the victim’s alleged interview statement that Movant was  
“innocent” of commercial sex trafficking has no bearing on his guilt.

1 pimping and trafficking, including Movant's rap video entitled, "Treat Her Like a  
2 Prostitute," which starred the minor-victim. [Doc. 91 at p. 10-11.]

3 For the previous reasons, Movant's § 2255 Motion and Amendments, [Docs. 69, 82,  
4 88], are DENIED.

#### 5 **D. Movant's Remaining Ancillary Motions**

6 Finally, the Court addresses Movant's remaining outstanding motions. [Docs. 87,  
7 108, 110.] First, Movant moves the Court "to take Judicial Notice of 2 Missing Motions  
8 in Docket Sheet." [Doc. 87.] Because both missing motions are reflected on the docket  
9 for this case in Docs. 108 and 113, Movant's motion is DENIED as moot. [Doc. 87.]

10 On June 18, 2018, Movant also filed a "Motion rule 12(c) for Judgment on all  
11 pending pleading (fed. R. civ. P. 12(c) and hold a evidentiary hearing." [Doc. 108.]  
12 Because a motion for judgment on the pleadings is not applicable in the habeas context,  
13 the Court construes Movant's motion as seeking the Court's ruling on his pending habeas  
14 pleadings. Because this Order addresses those pleadings, the motion is DENIED as moot.

15 On May 2, 2018, Movant filed a motion to proceed *in forma pauperis* to obtain free  
16 transcripts of pre-trial proceedings. [Doc. 107.] On April 24, 2019, Movant filed a related  
17 motion for "free post/pre trial transcripts for pending 2255." [Doc. 101.] As discussed  
18 previously, because there is no evidentiary dispute that could lead to habeas relief for  
19 Movant, the Court finds there is no need for the requested transcripts or *in forma pauperis*  
20 status. These motions are DENIED as moot.

21 Finally, in support of his motion for a default judgment, [Doc. 110], Movant argues  
22 the Government failed to respond to the Court's October 22, 2018 Order. In light of the  
23 Government's response on October 31, 2018, [Doc. 91], however, default judgment is not  
24 appropriate, and the motion is DENIED as moot.

#### 25 **CONCLUSION**

26 For the previous reasons, Movant does not establish he received ineffective  
27 assistance or was prejudiced by the assistance, even if he did. In accordance with the  
28

1 conclusions set forth above, the Motions to Vacate, Set Aside, or Correct the Sentence are  
2 DENIED.

3 A court may issue a certificate of appealability where the movant has made a  
4 “substantial showing of the denial of a constitutional right,” and reasonable jurists could  
5 debate whether the motion should have been resolved differently or that the issues  
6 presented deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S.  
7 322, 335 (2003). The Court finds Movant does not make the necessary showing.  
8 Therefore, a certificate of appealability is DENIED.

9 **IT IS SO ORDERED.**

10  
11 DATED: May 1, 2019

  
HON. ROGER T. BENITEZ  
United States District Court Judge